August 20, 2018

DOW JONES

Comment of Dow Jones & Company
to the Federal Trade Commission

Re: Hearings on Competition and Consumer Protection in the 21st Century

I. <u>Introduction</u>

Dow Jones & Company ("Dow Jones") appreciates having the opportunity to submit these comments to the Commission in preparation for the upcoming Hearings on Competition and Consumer Protection in the 21st Century. The emergence of dominant technology platforms as the intermediaries between Internet users and online news content has serious implications for news publishers such as Dow Jones, and for society more broadly. We thus urge the Commission to explore how those platforms are wielding their growing power, and to consider whether it has the tools it needs to fulfill its critical antitrust and consumer protection missions.

Founded in 1882, Dow Jones is a global provider of news and business information, delivering content to consumers and organizations around the world in multiple formats, including print, digital, mobile, and live events. Dow Jones has produced news and information of unrivaled quality for more than 130 years and today has one of the world's largest newsgathering operations. Dow Jones produces leading publications and products including its flagship, The Wall Street Journal, America's largest daily newspaper by paid print circulation; the Factiva news and information database; Barron's, the world's premier investing publication; MarketWatch, one of the first websites focusing on financial news and market data; Financial News, which covers the financial industry from London; Dow Jones Risk & Compliance, a leading provider of anti-money laundering, anti-corruption, and sanctions compliance data solutions; the real-time Dow Jones Newswires service; and Dow Jones Venture Source, the most accurate database on venture-backed companies. Dow Jones is well-positioned to observe and comment on the impact of certain tech platform practices on premium news brands.

The Commission has solicited public comment on several topics dealing with the intersection of technology and the modern economy. In advance of the Commission's Hearings on those and other topics, we would like to use this submission to provide a contextual framework for understanding the incentives of dominant online platforms—who act as news aggregators—to free-ride on the content created by publishers such as Dow Jones, as well as the long-term negative effects of this free-riding on news publishers. We would also like to urge the Commission to consider the question of how to assess the short-term harm of this free-riding from the standpoint of competition and consumer protection; one example we suggest is "brand flattening," the disassociation of content from its provenance.

Below, we discuss that question in more detail and explain why we believe it is worthy of consideration.

II. Recognizing "Free Riding" as Having the Potential to Be Anticompetitive

Platform technologies generally benefit content creators and the public when they act as "matchmakers," providing additional incremental traffic to publishers and relevant links to users. However, when a dominant platform acts as a content aggregator, it purports to act as both matchmaker and content source at the same time. In these situations, the platform's matchmaking function often becomes subordinate to the content aggregation function, and there is an often unavoidable conflict between the economic incentives that are inherent to each role. This gives rise to a significant risk of harm to competition, as we discuss below. The potential harm is especially stark in the news industry where the largest aggregators have perhaps strayed the farthest from a matchmaking function and instead arrogate publisher content to compete directly with publishers for both consumer attention (and data) and advertising revenues.

News aggregators are sources of content that "do not produce any original content but rather curate content created by other outlets through using a combination of human editorial judgement and computer algorithms."[1] News aggregators "act in dual roles: their front pages look very similar to news outlets who produce original content, and thus may be a substitute for them; yet they also aggregate a wide range of sources, and may be an effective mechanism for search and discovery, which places it in the role of an upstream complement to the outlets who produce news."[2] Depending on which of these roles takes precedence, aggregators can either "increase or decrease the returns to investment in news reporting."[3] Like other types of technology platforms, news aggregators have the *potential* to "reduce[] search cost and enable[] smaller firms that may lack name recognition or reputation to be discovered by consumers."[4] This does *not* mean, however, that they are always beneficial. "In the case of news, the welfare effects depend on whether the investments that increase visibility on aggregators are welfare-

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1 Susan Athey, et al., *The Impact of Aggregators on Internet News Consumption* 2 (Working Paper, 2017), https://pdfs.semanticscholar.org/27e4/6dfcfbcce75660b39462cccff62328d0ede5.pdf.

2 *Id.*

3 *Id.*

4 *Id.* at 3.

enhancing (unique investigative journalism) or wasteful (misleading headlines), as well as whether smaller firms add to the diversity of alternative perspectives rather than reproduce news where the investments have been made by others."[5]

This is where the distinction between matchmakers and aggregators is key: matchmakers have an incentive to increase output on both sides so that they create and benefit from indirect network effects. Aggregators, especially ones that compete for advertising revenue and thus for attention and data, have an incentive to protect indirect traffic, weaken signals (such as brand) that increase direct traffic, present pages as substitutes and/or discriminate against sustainable models, such as paywalls, that disrupt content consumption in their ecosystems. These practices simultaneously impede the publishers' ability to monetize their content through advertising or subscriptions and promote aggregators. Stated differently, these practices maintain and protect the dominant aggregators while undermining the ability of publishers to compete with the aggregators for attention, data, and advertising revenues. When publishers lose access to their audiences, they struggle to sell targeted advertising and use personalized subscription models, which are now offered by certain aggregators directly.[6]

One of the biggest problems with news aggregators is that they free-ride on news publishers' content. Indeed, the history of online news has been a game of cat-and-mouse from the start, with content creators seeking to prevent free-riding by aggregators, which control approximately two-thirds of their overall traffic.[7] Aggregators typically co-opt publishers' content automatically by "scraping" it. Aggregators who scrape content are able to attract greater audiences than publishers because they can offer users a greater breadth of coverage (as a result of also scraping other publishers).[8] This type of behavior can be characterized as "forced free riding" when a platform monopolist "appropriates innovation by other firms that depend on the platform for access to consumers."[9]

News is even more vulnerable than other forms of content to forced free riding. Text can be scraped and copied very easily. News is also unique, because a longstanding

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5 *Id.* at 3-4.

6 The formats used by aggregators make it impossible for publishers to collect and use data on their audiences.

7 Chartbeat, *Mobile Direct Traffic Eclipses Facebook* (visited August 20, 2018), http://blog.chartbeat.com/2018/05/29/mobile-direct-traffic-eclipses-facebook/.

8 *See* Athey, *supra* note 1, at 4.

9 Howard Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PENN. LAW REV. 1663, 1699 (2013).

principle of copyright law holds that the raw facts that form the basis of a news report—while often uncovered, checked, and curated by the original publisher at great expense—may be "copied at will" so long as the copier does not also copy the original publisher's "original expression" or "selection and arrangement."[10] As a result, news publishers have very little control under copyright law over the use of the raw facts that they report. They are vulnerable to losing audience to copycat stories, which erodes the leverage they would otherwise have to withhold content in exchange for fairer treatment by the aggregator.

The result is the exact kind of harm that intellectual property laws attempt to combat in other contexts—free riding that destroys publishers' incentives to invest in new content generation: "when viewed from the perspective of innovation, such conduct is damaging, even absent any intellectual property violation . . . because the process of appropriating the developments of downstream rivals disincentivizes future downstream innovation."[11]

Free riding is an antitrust problem because the dominant news aggregators' market power makes it virtually impossible for content creators to withhold their content from those scrapers, resulting in the harm to innovation described above. Another reason is that the firm responsible for the forced free riding has, by virtue of its platform, the ability and incentive to act as a "bottleneck" monopolist (as discussed further in the separate comment submitted by News Corp). When such firms also act as news aggregators, they can make it difficult or impossible for a publisher to bypass their platforms.[12] As a result, the platform can affect not only what types of content are created, but also the monetization models that publishers are able to pursue, which in turn erodes the news output.

One prominent example of how a platform can impact publishers' ability to monetize their content is Google's now-abandoned First Click Free policy. First Click Free required that publishers allow users of Google's search engine to bypass paywalls and access content on subscription websites (such as The Wall Street Journal's WSJ.com) free of charge. If publishers did not acquiesce to this policy (which in practice affected much more than a single "first" click), their content would be demoted in Google's search rankings. As a result, Google's policy impeded publishers' efforts to develop

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[10] *Feist Publications Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991).

[11] Shelanski, *supra* note 10, at 1700.

[12] *See id.* at 1676, 1699.

robust subscription paywalls as a means to monetize their content; more than 90% of Google users never hit a paywall because of First Click Free.

In 2015, several major publishers, including News Corp, sought redress for this practice before the antitrust authorities of the European Union.[13] And, in 2017, The Wall Street Journal opted out of the policy. When it did, WSJ.com saw its traffic from Google search fall by 44%.[14] Another source noted traffic from Google News fall off by 89%.[15] Google subsequently agreed to terminate the policy in response to pressure from the European Commission.[16]

The history of First Click Free can serve as a useful case study to consider in the context of broader issues concerning how the Commission can most effectively identify and address practices that have the potential to harm innovation and welfare in a platform economy—especially when those practices relate to the vitally important news publishing business.

The potential for harm to competition is most acute when a dominant news aggregator positions itself to advertisers as a substitute for news publishers' own pages, and competes with publishers for advertising dollars by essentially co-opting those publishers' original content. In this context, news aggregators act as both news publishers' distributors and their direct competitors. They use their control over distribution, however, to give themselves an anticompetitive advantage.

In sum, certain dominant aggregators foreclose direct traffic to news websites and arrogate traffic, content and data to keep users in their ecosystems, which in turn reinforces their positions and decreases publishers' monetization and ability to compete. We encourage the Commission to consider these issues in the upcoming Hearings from the perspective of competition and consumer protection alike.

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13 Nicholas Hirst, *News Corp. files 2nd complaint against Google*, POLITICO (April 18, 2016).

14 Danny Sullivan, *Wall Street Journal's Google traffic drops 44% after pulling out of First Click Free*, SEARCH ENGINE LAND (June 5, 2017), https://searchengineland.com/wsj-google-traffic-down-276387.

15 *See* Nikas & Alpert, *Google Offers Olive Branch to Publishers by Relaxing Policy on Subscription Sites; Tech giant to end 'first click free' program and improve the standing of subscription sites in search results*, WALL STREET JOURNAL (Sept. 12, 2017), https://www.wsj.com/articles/google-offers-olive-branch-to-publishers-by-relaxing-policy-on-subscription-sites-1505259211?mod=article_inline.

16 *Id.*

III. **Recognizing Potential Reduction of Quality Output and Brand Flattening as Anticompetitive Effects**

In addition to the harms that flow from free-riding generally, we encourage the Commission to consider certain specific welfare harms that result, by design, from anticompetitive practices by dominant news aggregators. These include the reduction of quality output and the erosion of brand strength, both of which are of specific concern to the news industry.

A. Dominant Aggregators Reduce the News Output

One consequence of forced free riding is the ability of dominant aggregators to impose policies and restrictions that allow them to maintain their dominant role as the gateway to readers' discovery of news. The end result of these practices is an inevitable reduction in quality news output. Users are lured by short-term benefits such as "free" access to content[17] and improved discoverability across publications but the long-term impact of these practices is negative for them. When news publishers are unable to fully monetize their original content because of forced free riding by dominant aggregators, they can no longer make the investments needed to produce high-quality, accurate, reliable, and innovative journalism. And such harm is only exacerbated when the investments necessary to increase visibility and traffic through an aggregator are "wasteful ones" like misleading headlines, click-bait, and copying of content from other sources. These are significant and concrete welfare effects with profound implications for the business of journalism, the output of high-quality news, and access to informative and accurate news for the public at large. Because these welfare effects manifest themselves in reduced quality and competition among news publishers, they are highly relevant from an antitrust perspective.

As noted in the separate Comment submitted by News Corp, it may be difficult for regulators or courts to measure a decrease in the quality of news output—how best to do so is an issue we encourage the Commission, in the course of the Hearings, to consider and address.

B. Brand Flattening: Dominant Aggregators Erode the Benefits Associated With News Brands

News publishers have traditionally had powerful incentives to invest in their brands by developing high-quality content that consumers can trust. Consumers benefit when news organizations compete with one another to build the strongest, most

[17] Consumer access is "free" only to the extent one disregards the provision of valuable consumer data as a form of consideration.

trustworthy brands. Among other things, such competition leads to more original, accurate, and objective news reporting. Platform intermediaries and news aggregators, on the other hand, have powerful incentives to weaken and undermine publisher brands. This is because, in an online environment, the stronger the publisher brand, the more likely consumers are to navigate directly to the publisher (*e.g.*, via its home page or branded app) and bypass the intermediary.

As these intermediaries' influence has grown and they have acted on these incentives, one result has been **brand flattening**, which is the weakening of the association between content and its source.

We recognize that, despite the long-term consumer harm associated with reduced output, news aggregation has generated certain short-term benefits for consumers. These may include access to new sources (including through AI- and algorithm-based recommendations) and enhanced discoverability when looking for news on certain topics. And, as noted above in Part II, aggregators can "enable[] smaller firms that may lack name recognition to be discovered by consumers"—which may, of course, have benefits for competition and economic welfare.[18] However, at least in the case of news publishing, those positive short-term welfare effects are far outweighed by the negative effects associated with brand flattening. When a dominant platform or aggregator is able and incentivized to erode the brand recognition of larger publishers in order to increase its own relevance to readers and thereby capture a greater share of advertising revenue, competition and economic welfare suffer. One empirical study, for example, found that:

> [W]hile large publishers may not see an effect in overall page views as a result of aggregators, they may lose traffic to their home pages, as well as their role in curating news, as readers read articles referred by Google News at the expense of articles referred by their own home pages (where newspapers monetize the home pages much better than articles). ***If readers do not pay attention to the identity of the publisher when they read articles on Google News, then the large publishers may lose their incentives to maintain a reputation for quality***, and consumers may be less willing to subscribe to the publisher or use the publisher's mobile application.[19]

Brand flattening thus results in a direct and tangible welfare harm: the erosion of investment in original, trustworthy and engaging journalism and innovative publishing, and the promotion of commoditized news formats, fabricated news, click-bait, and

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[18] Athey, *supra* note 1, at 3.

[19] *Id.* at 27 (emphasis added).

general consumer confusion. Even if the discoverability of articles by topic has improved, users are deprived of their ability to find content based on sources they trust and want to engage with. We encourage the Commission to recognize the welfare effects of brand flattening in the news industry and, through the Hearings, to consider how the Commission might use its enforcement authority to target anticompetitive conduct that leads to brand flattening.

i. Strong Publisher Brands Benefit Consumers

As far as readers are concerned, trust is a key component of publisher content quality. Publishers are incentivized to build strong brands, centered around high-quality content, because they want to gain the trust of consumers and improve engagement.[20] With the rise of fabricated news and uncertainty, trust has become an even more valuable currency for publishers' brands.[21] Strong publisher brands also reduce search costs for consumers. Given that news consumers place a high importance on content accuracy, publishers with strong brands see consumers navigating directly to their suite of content more frequently. The erosion of trust increases search costs for consumers because consumers are required to verify and assess the reliability of an underlying source for themselves. Readers' reliance on fact-checking websites, for example, has increased, adding to the time that readers spend to find trustworthy news. The 2018 Edelman Trust Barometer study found that 63% of consumers agree that "the average person does not know how to tell good journalism from rumors or falsehoods," and 59% of consumers agree that "it is becoming harder to tell if a piece of news was produced by a respected media organization."[22]

Finally, in addition to its importance to readers, a publisher's brand is also vital to its relationship with advertisers who increasingly care about "brand safety" and want to know where their ads are being displayed—Adweek recently noted a study showing that 78 percent of chief marketing officers "believe inadvertent links with unsuitable content could diminish brand reputation."[23]

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[20] Isabelle Krebs, *Does the brand affect the quality perception of news articles?*, J. MEDIA & BUSINESS STUDIES 235 (2017).

[21] Geoff Ramsey, *Dealing with the Media Trust Meltdown*, EMARKETER (May 11, 2018), https://www.emarketer.com/content/dealing-with-the-media-trust-meltdown.

[22] Edelman, 2018 EDELMAN TRUST BAROMETER: GLOBAL REPORT (Feb. 2018), http://cms.edelman.com/sites/default/files/2018-02/2018_Edelman_Trust_Barometer_Global_Report_FEB.pdf

[23] Giovanni Strocchi, *What Does Brand Safety Mean in 2018*, AW360 (April 30, 2018), http://360.advertisingweek.com/what-does-brand-safety-mean-in-2018/.

ii. Platform Intermediaries and Dominant News Aggregators Have Incentives and Ability to Flatten Brands

Brand flattening, as noted above, is the weakening of the association between content (or any product) and its provenance. It occurs when, for example, search platforms or other dominant aggregators (on which publishers depend to drive traffic) impose restrictions that require content to be formatted or distributed in a way that (1) weakens brand association; (2) is designed to keep users within the platform ecosystem or facilitate their return; and/or (3) renders dynamic and brand-differentiated content incompatible.

As discussed in Section II above, aggregators' home pages are often visually and functionally very similar to the homepages of the publishers, with the difference being that aggregators combine content from many different publishers and display it to consumers on a single platform—they produce no content of their own. But, like publishers, aggregators want to become the focal point for reader attention in order to maximize their return traffic and ability to extract valuable reader data.

Aggregators are thus in direct competition with the original publishers of the content they aggregate.[24] With strong publisher brands, consumers are more likely to navigate directly to a particular brand and will rely on the *publisher* to curate news content. They will accordingly be less inclined to rely on the aggregator to steer their attention toward content from other publishers. By contrast, when brands become less differentiated, the role of the aggregator as intermediary becomes more prominent. Consumers rely more heavily on the aggregator to point them to content that matches their interests. And publishers rely more heavily on the aggregator to find the consumers who otherwise might have been attracted by the publisher's brand. Dominant aggregators thus have an incentive to impose conditions that flatten publishers' brands.

iii. Evidence Confirms Brand Flattening for Content Accessed through Aggregators

Brand flattening is not a theoretical phenomenon. It has already taken root, and its effects are being seen specifically in the realm of news publishing. As noted above, studies such as the Edelman Trust Barometer show that readers' ability to identify the source of their news, and to differentiate between trustworthy and untrustworthy sources, is eroding. A recent analysis by the Reuters Institute for the Study of Journalism likewise found that roughly two thirds of consumers remember the path through which they found a news story (*e.g.*, Facebook, Google), while less than half of consumers recall the name

[24] *See* Athey, *supra* note 1.

of the news outlet that originally published the piece of content.[25] And the Pew Research Center has determined that "[w]hen news links came directly from a news organization's emails, texts or alerts, the individual could name a source for that link 78% of the time" but that this level of source recall "far outpaced" the metric "when a link came through social media (52% of such instances) or a friend's email or text (50%)."[26]

iv. Brand Flattening Produces Negative Welfare Effects

Brand flattening does more than harm the publishers whose brands are flattened. It also erodes the positive welfare effects produced by strong news brands. News brands are unique in that they signal the economic value of the news and its distribution costs (just as any consumer brand does) but they also have a social impact: in a world where readers cannot discover content that they can trust and engage with, negative trends such as fabricated news, click-bait and copycats can prosper. This warrants the Commission's attention.

Brand flattening can also decrease premium publishers' incentives to differentiate themselves through investments in innovation. For example, publishers have recently experimented with several new and innovative approaches to presenting content including artificial intelligence, virtual reality, chatbots, new distribution methods, and metered paywalls.[27] However, the more that consumers rely on intermediaries such as news aggregators to locate and access content, the less ability publishers have to monetize their investments in such innovations—especially when the intermediary requires content to fit within its own defined parameters in order to achieve visibility on the platform. The effect of such requirements is to disincentivize innovation and reduce differentiation in the way news is delivered and the messages it can convey.

Finally, brand flattening can devalue a publisher's relationship with advertisers and have a negative impact on the functioning of the advertising market. Studies have shown that readers view ads more favorably when they are associated with a trusted

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[25] Nic Newman, et al., REUTERS INSTITUTE DIGITAL NEWS REPORT 2017 15 (2017) ("Overall, we found that roughly two-thirds remembered the path through which they found the news story (Facebook, Google, etc.), but less than half could recall the name of the news brand itself when coming from search (37%) and social (47%).").

[26] *See* Kristen Bialik & Katerina Eva Matsa, *Key trends in social and digital news media*, PEW RESEARCH CTR. (Oct. 4, 2017), http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/.

[27] Amy Mitchell & Jesse Holcomb, *State of the News Media 2016*, PEW RESEARCH CTR. (June 15, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf; Alexis Lloyd, *The Future of News is Not an Article*, N.Y. TIMES RESEARCH & DEVELOPMENT GRP. (Oct. 20, 2015), http://nytlabs.com/blog/2015/10/20/particles/.

publisher's brand: a 2018 Nielsen study highlighted the importance of news content, in particular, to publisher brands and advertisers.[28] "News websites help drive sales for brands and create value for advertisers through quality journalism."[29] Further, the introduction of news aggregators as intermediaries exposes the aggregator to data that previously would have belonged solely to the publishers. A publisher can only track a specific user across its own properties, while ad intermediaries can track the same user across multiple publishers' content. This capability allows the intermediary to capture more data than the publisher. Publishers have less "first-party" data and thus need to rely more on "third-party" data, which is anonymized and therefore much less targeted.

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In sum, the combination of decreased quality news output and brand flattening have a significant deleterious effect on competition in the online news industry and the users' experience. We encourage the Commission to use these Hearings as an opportunity to recognize these realities as forms of competitive harm. There is a balance to be struck, of course, and we encourage the Commission to consider for instance how and where to draw lines between the democratization of online news and the distorted incentives caused by the erosion of brand equity.

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[28] *Press Release: News Drives Positive Results for Advertisers*, MARKETWATCH (June 12, 2018), https://www.marketwatch.com/press-release/news-drives-positive-results-for-advertisers-2018-06-12.

[29] *Id.*